SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971
No. 5276

Supreme Court, U.S.
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ALBERT DELANOR MUREL,

Petitioner,

vs.

BALTIMORE CITY CRIMINAL COURT and DIRECTOR OF PATUXENT INSTITUTION, STATE OF MARYLAND,

Respondent.

ROBERT HAYES, JR.,

Petitioner,

vs.

HAROLD M. BOSLOW, M.D., Director Patuxent Institution,

Respondent.

BRADLEY ARLINGTON AVEY,

Petitioner,

vs.

STATE OF MARYLAND, HAROLD M. BOSLOW as Director of Patuxent Institution, and VERNON L. PEPPERSACK as Commissioner, State Department of Corrections,

Respondent.

GEORGE L. CRESWELL,

Petitioner,

vs.

DIRECTOR, PATUXENT INSTITUTION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF AMICUS CURIAE.

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BRIEF OF AMICUS CURIAE.

Interest of the Amicus Curiae.

The National Legal Program on Health Problems of the Poor is a law reform center funded by the U.S. Office of Economic Opportunity to provide support for

OEO Legal Services programs across the country in cases involving health problems of the poor, and to provide, through education, research and legal representation, assistance in the preparation of important litigation in health law. The Program is based at the U.C.L.A. School of Law and has available to it a full staff, including attorneys and health professionls, and the resources of the University in support of its work.

The Program has done extensive work to improve delivery of mental health services and to protect the civil rights of individuals involved in the mental health system. The Program has been particularly concerned that voluntary mental health services be widely available and that involuntary mental health services actually fulfil treatment purposes. Attorneys from the Program have been active in mental health services planning, drafting legislation, and lawsuits to ensure, among other things, access to voluntary services, informed consent prior to experimentation, and involuntary patients' right to treatment.

The case under review presents a number of constitutional questions which affect the delivery of mental health services. Of particular interest to the Program are those issues which concern the due process rights of individuals compelled to submit to psychiatric treatment and the right of those persons to individualized treatment. The *amicae* have limited this brief to argument on those issues. To avoid unnecessary repetition the brief omits the history of the case in the courts below, jurisdictional statement and statement of facts.

Summary of Argument.

The Maryland Defective Delinquent Act provides that emotionally unbalanced or intellectually deficient persons, who have been convicted of a crime, may be civilly committed until the time when their release will not jeopardize the safety of society. Proceedings to determine whether a person is a defective delinquent consist of the intial referral by the trial court, the examination and report by the psychiatric professionals, and the hearing. These proceedings are guided by rules of civil procedure.

In examining similar statutes, this Court has looked to two principle factors to determine whether or not due process requires the full range of protections available in criminal prosecutions: 1) whether the statute requires a new finding of fact, and 2) whether the sanction imposed is punitive. Confinement, particularly indeterminate confinement, has been held to be punitive whether its purpose is preventive, rehabilitative or retributive.

Defective delinquency requires at least two new findings of fact: dangerousness to society and emotional unbalance or intellectual deficiency. The sanction is confinement possibly for life. Due process requires that the subject be afforded all the protections of a criminal prosecution.

The Defective Delinquent Act clearly provides a mechanism for civil incarceration regardless of whether the subject is treatable or in fact receiving adequate

treatment. It is essentially a preventive detention statute, that is, a statute to prevent future anti-social acts by confining persons adjudged to have a propensity for crime.

As a result of its application and the unavailability of treatment, persons may be forced to serve a sentence in excess of the statutory maximum for their original crime. Such discriminatory use of indeterminate sentences based on criteria such as I.Q. tests denies the subject equal protection.

Preventive detention based on minimal procedural protections replaces the traditional presumption of innocence with a presumption of guilt given the opportunity and makes preparation of a defense nearly impossible. A person accused under the Act may be punished indefinitely in the absence of specific misconduct, in fact, for acts which he has yet to commit. Such a procedure clearly deprives the accused of due process and equal protection.

ARGUMENT.

I.

THE MARYLAND DEFECTIVE DELINQUENT ACT IS UNCONSTITUTIONAL IN THAT IT IMPOSES COMPULSORY CONFINEMENT WITHOUT AFFORDING THE PERSONS ACCUSED THE FUNDAMENTAL PROTECTIONS REQUIRED BY DUE PROCESS.

The Maryland Defective Delinquent Act provides for detention for an indeterminate period for persons found to be defective delinquents. Treatment must be afforded only "when appropriate." Confinement is terminated only when it is "reasonably safe for society to terminate the confinement and treatment."

A. The Fact-Finding Procedure.

The procedure for determining defective delinquent status is outlined in the statute and the case of *Director of Patuxent Institution v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966).[1] In brief, this procedure consists of three

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[1]As defined by the statute a defective delinquent is any individual who has been convicted of one or more of certain categories of criminal offenses and who . . ., "by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."—Annotated Code of Maryland, Article 31B, §5.

The prior offenses must have been:

(1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State. Annotated Code of Maryland, Article 31B, §6.

steps: 1) referral for examination, 2) the examination itself, and 3) the hearing.

The referral step provides virtually no protections for the subject. The trial court in which a person was convicted may refer him for examination on the request of the prosecutor or on its own initiative. The subject receives no notice that such a request for indeterminate commitment as a defective delinquent has been made, but merely receives a copy of the order for examination after the judge has made his decision. No counsel or hearing is provided at this stage of the proceedings. Pursuant to the order for examination, the person is immediately transferred to Patuxent Institution, Annotated Code of Maryland, Art. 31B, §6.

The examination step takes place at Patuxent Institution. At least three professionals (one psychiatrist, one physician, and one psychologist) examine the subject and compile all "pertinent information," including information about the crime for which he was convicted, other anti-social or criminal acts committed during the life of the individual, sentencing and probation reports, and "reports as to his social, physical, mental, and psychiatric condition and history." The group of professionals then determine, by majority vote if necessary, whether in their opinion the subject is a defective delinquent. The professionals submit their findings in a written report to the court. Art. 31B, §7. At this stage in the proceedings, the subject is not represented by counsel and has no representative present at the decision-making conference. Further he is not allowed to assert his privilege against self-incrimination without subjecting himself to punishment, for individuals who do not cooperate with the interviewers may be held

indefinitely at Patuxent without any judicial hearing. (App. 217, App. 68-70, 217, 281-82, 311.)

The hearing step of the procedure follows if the professionals have reported that the subject is in their opinion a defective delinquent. Prior to the hearing the subject is summoned to the court, advised of the report and pendency of the defective delinquency proceedings and advised of his right to counsel. Counsel is appointed by the court at this stage. Counsel for the subject has access to the reports compiled by the professionals at Patuxent Institution.

At the hearing itself, the issue is simply whether or not the subject is a defective delinquent. Annotated Code of Maryland, Art. 31B, §8. The subject has a right to a jury trial. However the state need only prove defective delinquency by a preponderance of the evidence and with concurrence of only three-quarters of the jury. The State can use hearsay evidence to present its *prima facie* case. The subject must subpoena witnesses whom he wishes to confront.

B. The Sanction.

If the court or jury finds that the subject is a defective delinquent, the court shall "order him to be committed or returned to the institution for confinement as a defective delinquent, for an indeterminate period without either maximum or minimum limits." The original sentence is suspended, Art. 31B, §9(b). The defective delinquent must then remain at Patuxent Institution until the Institutional Board of Review, which must review each delinquent's status annually (Art. 31B, §13(b)), determines that it is "reasonably safe for society to terminate the confinement and treatment," Art. 31 B, §5.

C. The Due Process Requirements.

The procedure outlined in the Defective Delinquent Act is labelled "civil". The sanction however is a criminal penalty: incarceration possibly for life. Treatment pursuant to the law is to be afforded only "when appropriate". As will be shown *infra*, the statute is a preventive detention mechanism which affords indefinite periods of commitment for persons deemed dangerous who have committed at least one anti-social act. The severity of this sanction renders the procedural protections afforded the subject inadequate despite the fact that the confinement is labeled civil and imposed for the purposes of treatment and prevention of dangerous behavior.

Since the cases of *In re Gault*, 387 U.S. 1 (1967), and *Specht v. Patterson*, 386 U.S. 605 (1967), courts have given precedence to the fact of involuntary incarceration rather than the promises and speculation about therapeutic and rehabilitative effect in determining to what extent procedural due process is applicable to fact-finding proceedings labeled "civil". In *Gault* and *Specht* this Court held that confinement must be viewed as confinement despite society's use of more palatable labels. In *Gault* this Court looked to the fact that, despite the benevolent purposes for civil rather than criminal commitment of juveniles, "[t]he boy is committed to an institution where he may be restrained of liberty for years." 387 U.S. 1, 27. The Constitution requires that such a deprivation of liberty can only be imposed after "the procedural regularity and the exercise of care implied in the phrase 'due process'." 387 U.S. 1, 27-8.

In *Specht v. Patterson*, in reviewing a sex offender statute, this Court also looked to the nature of the sanc-

tion rather than the superficial nature of the proceeding to determine due process requirements. Referring to *United States v. Brown,* 381 U.S. 437, 458, this Court noted that:

> [t]he punishment under the second Act [indeterminate confinement] is criminal punishment even though it is designed not so much for retribution as it is to keep individuals from inflicting future harm.

The fact that the subject in *Specht* had previously been convicted of a crime in no way reduced his right to due process since prosecution under the Sex Offenders Statute required a "new finding of fact . . . that was not an ingredient for the offense charged." 386 U.S. 605, 608. Approving the Third Circuit case of *Gerchman v. Maroney,* 355 F. 2d 302, 312, which involved a similar statute, this Court held that due process required a judicial hearing for the new finding of fact with the "full panoply of the relevant protections which due process guarantees in state criminal proceedings." 386 U.S. 605, 609.

In the case presently before this Court, the lower courts erred in focusing their analysis on the "criminal" or "civil" label of the statute. They applied the letter but not the spirit of *Kennedy v. Mendoza-Martinez,* 372 U.S. 168, by applying a restrictive definition of punishment. They ignored this Court's concern for reality rather than appearances in *Gault* and the definition of punishment applied in *United States v. Brown:*

> Punishment serves several purposes; retributive, rehabilitative deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment. 381 U.S. 437, 458.

The sanction required in the Maryland Defective Delinquent Act, indeterminate confinement of individuals who are emotionally unbalanced or intellectually deficient for the safety of society, is criminal punishment. That treatment may be incidentally afforded, if it is deemed to be "appropriate," does not change the nature of the commitment. Commitment under the Act requires the full due process protections afforded those accused in criminal prosecutions including: 1) the right to notice and a hearing, 2) conviction by proof beyond a reasonable doubt, 3) the right to the effective assistance of counsel, 4) the right of confrontation and cross-examination, and 5) the privilege against self-incrimination.

1. The Right to Notice and a Hearing.

The Maryland statute does not require that any notice of impending transfer be given to the inmate, nor that any kind of hearing be held on the issue. The individual accused of being a defective delinquent is summarily transferred to Patuxent Institution and is ordered to undergo the examinations and tests provided for therein. There is no requirement that the individual be apprised of the new proceeding nor the reasons for the examinations. He is given no opportunity to be heard on the matter and he has no right to challenge the initial order of commitment.

This procedure clearly violates the basic constitutional standards for adequate notice and the right to a fair hearing. In *Simon v. Craft,* 182 U.S. 427 (1901), the Court acknowledged that the due process requirement of full notice and an opportunity to be heard were applicable in mental commitment proceedings as well as criminal prosecutions. In order to comply with

these standards, notice of the charge must be given sufficiently in advance of the scheduled proceedings so that there is a reasonable opportunity to prepare, and it must set forth the alleged misconduct with some particularity. This Court held in *In re Gault*, 387 U.S. 1 (1967), that the hearing itself must give the individual the opportunity to be heard at a meaningful time and in a meaningful manner so that an initial determination as to the validity of the charges or order can be made. See also *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The statute in question here provides that certain inmates can be transferred to Patuxent Institution for the purpose of examination without giving them any notice or the right to a hearing on the matter. The omission of these rights cannot be justified by claiming that since the individual has already been convicted and is subject to incarceration, he is not being deprived of any further rights by temporarily transferring him to a mental institution. The fact is that transfer and initial commitment of the inmate to Patuxent Institution is the first and most significant step in a long process which may well lead to indefinite or even permanent confinement. As such, it should be subject to basic due process requirements including the right to timely and adequate notice, and the right to a hearing wherein the validity of the order can be challenged.

Moreover, in *Goldberg v. Kelly, supra*, the court has indicated that the extent to which procedural due process must be afforded in a given situation is influenced by the extent to which an individual may be condemned to suffer grievous loss, and depends upon whether the individual's interest in avoiding that loss outweighs the government's interest in summary adjudication. In that case, the suspension of welfare benefits

was considered to be a sufficiently significant loss so as to require a hearing "at a meaningful time and in a meaningful manner" despite the state's interest in conserving fiscal and administrative resources.

In the case of commitment proceedings, the possible harm, stigma and deprivation of liberty an individual may suffer are far greater than that which may be suffered by the welfare recipient. Although an initial order of commitment does not necessarily mean that an individual will be classified as a defective delinquent, there is a strong possibility that this result will occur. Moreover, the intial transfer and examination procedures often lead in themselves to considerable additional loss of liberty, as, for example, when the inmate refuses to testify or cooperate with authorities. Before having to submit to such an order, the inmate should at least have the minimal due process protection afforded in *Goldberg, i.e.,* the right to timely and adequate notice and the right to a hearing wherein the factual premises on which the order is based can be challenged, and an initial determination of its validity can be made.

As the Act is written and applied, however, notice of the proceeding, nor right to a hearing is given to the inmate until after an affirmative decision is made by Patuxent officials on the issue of his "delinquency." By that time, the inmate has been confined to the mental institution for an average of nine months to a year without having had the opportunity to be heard or to question the original commitment order. (E. 669.)[2]

[2]References preceded by "App." refer to the Joint Appendix of the proceedings in the United States District Court below. References preceded by "E." refer to the Joint Record Extract used by the Court of Appeals of Maryland in the Daniels-Avey appeal. 243 Md. 16, 221 A.2d 397 (1966).

Moreover, he has had to undergo extensive interviews, tests, and examinations, which form the basis of the Institution's recommendation without ever having been notified of the charges against him or the nature and purpose of the proceeding. It is difficult to contend that the notice finally given to a prisoner after a year of confinement (and investigation) is timely and adequate, or that a hearing which takes place only after an official determination of the ultimate issue in the case is meaningful or fair. As Justice Frankfurter said *In re Oliver*, 333 U.S. 257 (1940):

> It would not be fair if in the court in which the accused can contest for the first time the validity of the charge against him, he comes handicapped with a finding against him which he did not have an adequate opportunity of resisting. At 284-85.

Clearly, then, the Act violates due process in that there are no provisions for notice and a hearing during the initial stages of the proceeding when the assertion of such rights would prove most valuable. The accused inmate has neither the right to be notified of the charges nor the right to be heard on those charges until a determination on the ultimate issue of defective delinquency has been rendered by the Patuxent Institution staff. In view of the critical nature of this official determination and the protracted length of time an inmate must stay at Patuxent Institution before the rendering of such judgment, the protections as afforded by the ultimate recognition of these rights at a later point are not sufficient to satisfy basic constitutional standards.

2. Conviction by Proof Beyond a Reasonable Doubt.

Under the Defective Delinquency Act, an affirmative adjudication of defective delinquency need not be beyond a reasonable doubt; rather the statute as applied requires that such a determination need be only by a "preponderance of the evidence." Such a standard is clearly inappropriate in the context of these proceedings and it has recently been declared unconstitutional in an analogous civil proceeding which was penal in nature. *In re Winship,* 397 U.S. 358 (1970).

As it is virtually impossible to distinguish this case from *Winship,* the rationale of that opinion is equally applicable in proceedings to determine defective delinquency. In *Winship,* this Court held that the constitutional safeguard of proof beyond a reasonable doubt is as much required during the ajudicatory stage of a delinquency proceeding as are those other constitutional safeguards required in *Gault.* In requiring the same standard applied in criminal trials, the court emphasized that regardless of the label applied to the proceeding, the critical determination was whether the sanctions imposed were punitive in nature and whether the loss of liberty involved was equivalent to that which results from the finding of guilt in a criminal trial.

In the present case, as in *Winship,* the accused has at stake an "interest of immense importance both because of the possibility he may lose his liberty . . . and because . . . he would be stigmatized by the conviction." 397 U.S. at 363. The penalty for being convicted under this Act may be far greater than that for which the inmate was originally convicted. The individual who is committed is incarcerated in a prison-like

setting for an indefinite period of time, perhaps for life. Moreover, in addition to his criminal conviction, he is further stigmatized by the label of defective delinquent, and all that it implies.

It is thus apparent that these defective delinquency proceedings have all the incidents of a criminal prosecution, and are penal in nature. The accused inmate should be entitled to the "full panoply of relevant protections which due process requires in criminal proceedings." *Specht v. Patterson,* 386 U.S. 605, 609 (1967). One of the mot important of these protections is the requirement of proof beyond a reasonable doubt. The court in *Winship* explicitly rejected the notion that there is "only a tenuous difference between the reasonable doubt and the preponderance standard." 397 U.S. at 367. Whenever an individual is subjected to such a harsh penalty as indeterminate confinement, he must be proved guilty beyond a reasonable doubt. The trier of facts cannot convict unless it reaches a "subjective state of certitude" about all the facts in issue.

Since the decision and rationale of the *Winship* case are clearly applicable here, the Maryland Act does not meet constitutional standards, and the inmates convicted under it have been denied an essential due process right.

3. The Right to the Effective Assistance of Counsel.

The inmate who is transferred to Patuxent Institution has no right to counsel until after an affirmative unilateral determination of delinquency is made by the staff. Generally, this does not occur until after the inmate has been at Patuxent Institution for several months. For inmates who refuse to cooperate, the right to counsel may never arise. (App. 68-70, 281-82, 311.)

During this time, the inmate is subjected to various interviews, tests and examinations and all the information upon which the staff bases its decision is gathered. By the time the inmate is finally given the right to counsel, that right has become almost meaningless. The trial itself is reduced to a mere formality since an affirmative decision by the staff almost always means commitment for the inmate.

In *United States v. Wade,* 388 U.S. 218 (1967), the Court asserted that the "plain wording of [the Sixth Amendment] encompasses counsel's assistance whenever necessary to assure a meaningful defense." *Id.* at 225. The accused must be allowed to have the guiding hand of counsel at every step in the proceedings against him. The Court stated in *Wade:*

> The accused is guaranteed that he need not stand alone against the state at any stage of the proceedings, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The principle of *Powell v. Alabama* and succeeding cases require that we scrutinize any pretrial confrontation of the accused to determine whether presence of counsel is necessary to preserve defendant's basic right to a fair trial, as affected by his right meaningfully to cross-examine witnesses against him and to have effective assistance of counsel at trial itself. *Id.* at 226-27.

The fact that these proceedings are labeled civil does not mean that a lesser standard should apply since the accused faces "the awesome prospect of incarceration" for life. A "meaningful defense" is therefore essential for the protection of his rights, *In re Gault.* In

view of the fact that the decision on the ultimate issue in the case has already been made by the time counsel is appointed, the ability of counsel to prepare and offer a meaningful defense is severely limited. The Court stated in *Escobedo v. Illinois,* 378 U.S. 478, 487 (1964):

> . . . the right to use counsel at the formal trial would be a very hollow thing if, for all practical purposes, the conviction is already assured by pretrial examination.

In the present case, the denial of the inmate's right to counsel at critical pretrial proceedings which actually determine his fate makes the trial itself a "hollow thing" and clearly violates his Sixth Amendment rights.

The right to counsel must arise as soon as the initial decision to transfer the inmate to Patuxent Institution is made. It is at this point that the validity of the order should be initially screened, since the transfer sets in motion a process which imposes severe limits on the individual's liberty. The inmate who is transferred must undergo a series of interviews, tests, and examinations at which information harmful to his interests is likely to be elicited. He is not apprised of the purpose of the proceedings, and he is not permitted to exercise any of his constitutional rights. In an atmosphere of such compulsion, where lack of co-operation is often regarded as evidence of delinquency, an inmate should be permitted to have the advice and assistance of legal counsel so that his basic constitutional rights may be protected.

Moreover, the right to counsel guarantee must also apply to critical pretrial staff conferences and all interviews which the inmate must attend. In *Timmons v.*

Peyton, 360 F.2d 327, 330 (4th Cir. 1966) the Court of Appeals has stated that

> . . . the preparation of the defense may not without violation of due process be postponed indefinitely until the state has completed its case.

Rather, the preparation of the defense must proceed concurrently with the state's. In the proceedings in question, however, there is no opportunity for counsel to prepare any defense until after the state has completed its case. By that time, the right to a defense is virtually meaningless. Not only has a determination of the inmate's defective delinquency already been made, but it has been made in a way that the defense will never adequately be able to discover. There is no effective way for defense's counsel to ascertain what actually went on at the staff conferences and psychiatric interviews. He can never really know, for example, whether the inmate's basic rights were violated, whether the determination of his delinquency rested on firm grounds or whether it resulted from the inmate's lack of co-operation.

In *Wade,* this Court held that every pretrial confrontation must be analyzed to determine whether "substantial potential prejudice" inheres in a particular confrontation, and whether an attorney can help avoid that prejudice. If the answer is affirmative, defense counsel must be presented to protect a suspect's constitutional rights. This standard would clearly be applicable to staff conferences which require the inmate's presence since they represent an important confrontation with experts likely to testify for the government. Just as the Court in *Wade* contended that a witness, having initially identified a suspect in a line-up, is un-

likely to retract that identification at trial, representatives of Patuxent Institution rarely (if ever) contradict in their testimony at trial an opinion they have voiced at a staff conference. Therefore, the presence of defense counsel at staff conferences and interviews is absolutely essential in order to protect the inmate's Sixth Amendment rights.

4. The Right of Confrontation and Cross-Examination.

During the trial itself, the accused has no real opportunity to confront or cross-examine the witnesses against him. The state's case is generally presented by a sole witness who reads a written report prepared by the staff, containing the work and conclusions of other staff members as well as information from sources outside the Institution. This witness, who is usually the Director of the Institution, has in most cases no personal familiarity with the accused's case. Not only are the reports considered admissible hearsay, but they are alone sufficient to support a finding of guilt. As "experts'" opinions, they are accorded heavy weight and it is virtually impossible for the inmate to overcome their effect.

In *Pointer v. Texas,* 380 U.S. 400, 404 (1965) the court explicitly stated that "the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.". Moreover, in *Specht v. Patterson* the court ruled that the right of confrontation and cross-examination also applies in mental commitment proceedings, and that a psychiatric report, standing alone, is not sufficient to establish a constitutional basis for commitment. Clearly, then, the hearsay report of the Patuxent Institution staff does not meet the constitutional requirement, and

the state should have to produce the witnesses themselves before an adjudication of guilt can be made.

Under Maryland law, the accused has a right, through discovery procedures, to summon any of the persons whose names appear on the reports which are received in evidence. However, this procedural right falls far short of the right of cross-examination and confrontation which is required by The Sixth Amendment. In the first place, many of the people who mentioned in the reports may not be subject to a compulsory subpoena under the Maryland Rules in civil cases. In addition, most of the information in the report is itself based on hearsay so that producing the witness will be of little aid to the accused.

Moreover, it is constitutionally impermissible for the state to shift to the defendant the burden of finding and producing witnesses who are competent and who can testify to facts that the state must prove. The responsibility to do so must be on the state since it is the state that must prove guilt by a preponderance of the evidence. In *Gault*, the Court ruled that both "confrontation and sworn testimony by witnesses available for cross-examination [are] essential for a finding of 'delinquency'" in juvenile commitment proceedings. Since hearsay alone could not support a finding of guilt, it was clearly up to the state to produce the witnesses in court and give the defendant an opportunity to confront and cross-examine them.

Under the Maryland Act, an individual can be adjudged a defective delinquent on grounds which are

both vague and nebulous. (See, *infra*). It is impossible for a jury to make an independent, responsible decision on this issue when the only evidence received is a written report presented by the Director of the Institution. Moreover, if this is the only evidence presented, it is virtually impossible for the jury not to find defective delinquency on the basis of "a preponderance of evidence". If an inmate's right to a trial by jury is to have any meaning at all, the state must at least produce the "experts" who made the determination of delinquency, and the defense must have an opportunity to confront and cross-examine them at the trial itself. It is clear under *Specht* that a verdict based on hearsay alone does not meet constitutional standards.

5. The Privilege Against Self-Incrimination.

The Maryland Act, as it has been applied, clearly violates the inmate's right against self-incrimination. The inmates who are initially committed under the Act must spend an average of six months to a year at Patuxent Institution before a determination of their "delinquency" is made. During this time, they are compelled to submit to a variety of examinations and interviews. If they refuse to cooperate with the psychiatrists and other staff members, they are kept at the institution indefinitely. Thus, they are punished for exercising their Fifth Amendment right to remain silent.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court, in outlining the purpose and scope of the Fifth Amendment right, declared that the privilege "is avail-

able outside of criminal court proceedings" and it "serves to protect persons in all settings in which freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Moreover, in *Gault, supra* at 49, this Court held the privilege applicable in juvenile proceedings and stated that "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." Clearly then, under the Maryland Defective Delinquent Act, the constitution affords an inmate the right not to incriminate himself.

In the present case, inmates at Patuxent Institution must undergo intensive interviews in which they are asked to provide statements about anti-social conduct which may incriminate them and subject them to future prosecution. Until they agree to submit to such examinations and interviews, they may be confined to the institution indefinitely. Thus the exercise of the right against self-incrimination is punishable by indefinite detention at Patuxent Institution; yet if the inmate cooperates with the interviewing psychiatrists and makes statements about other anti-social acts he committed, such information could be used against him at a subsequent criminal proceeding. No immunity from prosecution is conferred by the statute on the inmate for statements made to the interviewing psychiatrists. (See Judge Sobeloff's separate opinion in *Tippett v. State of Maryland*, 436 F.2d 1153 at 1161).

This kind of punishment for the exercise of Fifth Amendment rights is clearly unconstitutional. In *Miranda*, the Court emphasized that the privilege to remain silent cannot be denied an individual, and that

the exercise of his Fifth Amendment rights must be "fully honored". As it stated therein, "If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. *Id.* at 480. Similarly, then, it is not for "the authorities" to decide to punish an individual who refuses to testify.

Moreover, the imposition of a civil penalty asserting the privilege against self-incrimination was specifically prohibited by this Court in *Spevack v. Klein*, 385 U.S. 511 (1967). Thus, Justice Douglas, in speaking for a plurality of the Court, said

> ". . . the concept of 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes the assertion of the privilege (against self-incrimination) 'costly' ". *Id.* at 515.

In the instant case, the penalty of silence is an indefinite "holding" at Patuxent Institution;[3] on the other hand, the penalty for cooperation with the authorities at Patuxent Institution is possible prosecution. Inmates should not be confronted with the cruel dilemma of having to waive the privilege against self-incrimination in order to prevent indefinite commitment. The value of the privilege hangs upon a slender reed indeed if it must be asserted at such a price. Few will claim it under these circumstances. This is exactly the price which *Miranda* and *Spevack* constitutionally prohibit being extracted.

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[3]In recent cases, the Court has struck down statutes which provided for criminal penalties for the exercise of one's rights against self-incrimination. *Haynes v. U.S.*, 390 U.S. 85 (1968); *Leary v. U.S.*, 395 U.S. 6 (1969); *U.S. v. Covington*, 395 U.S. 57 (1969); *Marchetti v. U.S.*, 390 U.S. 39 (1968); *Grosso v. U.S.*, 390 U.S. 62 (1968).

II.

THE MARYLAND DEFECTIVE DELINQUENT ACT IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THAT IT PROVIDES FOR CIVIL INCARCERATION WITHOUT TREATMENT.

A. The Act Permits Persons Subject to "Intellectual Deficiency or Emotional Unbalance" to Be Indefinitely confined Even if Treatment Is Unavailable.

Under Maryland law, a defective delinquent is defined as any individual who has been convicted of one or more of certain categories of criminal offenses[4] and who

> . . . , by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require *such* confinement and *treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.* Annotated Code of Maryland, Article 31B, §5. (Emphasis added.)

As noted *supra,* this statute on its face does not pretend to limit confinement to confinement for treatment purposes. In fact the principal goal of the statute appears to be to confine those persons judged a "danger to society." That this is the principal goal is made particularly clear by the fact that the standard for release from Patuxent Institution is not exhaustion of resources to treat the individual but rather the safety of society. The principal goal of preventive detention is further disclosed by the inclusion in the statute of

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[4]See *supra,* footnote 1.

"intellectual deficiency" as an alternative basis for indefinite commitment in the absence of "emotional unbalance." Since there is no known medical treatment to remedy intellectual deficiency, it is clear that a principal focus of the statute is not remediation of "disease" but preventive detention. For those persons for whom no effective treatment is known,[5] for whom treatment is judged inappropriate, or for whom treatment available at Patuxent Institution is inadequate, the Defective Delinquent Act provides no more than punishment and preventive detention.

The problem of detention without treatment is not simply a theoretical one. The principal type of therapy offered is group therapy. (App. 255.) In 1961, Patuxent Institution did not have a sufficient number of therapists to offer even group therapy to all of the inmates, and as a result the therapists were authorized to select the inmates they believed were most likely to benefit. (App. 252.) Staff members testified that at least 15% of the committed inmates receive no psychotherapy at all. The adequacy of both group therapy and the vocational and educational programs was subject to dispute during the trial. (App. 428, 415, 85, 120.) Yet none of the courts below actually confronted the treatment problem. Their conclusions that "All committed inmates are 'treatable', but not necessarily curable", 395 F.2d 387, 416, and that "the illness does not await the discovery of a cure," 221 A.2d 397, 417, beg the serious constitutional questions involved in civil detention without treatment.

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[5]As noted *supra*, this includes virtually all of those determined to be intellectually deficient, for there is no effective treatment to provide a remedy for those unfortunates deemed in want of the intellectual resources nature has provided to others.

B. Persons Civilly Committed for Treatment Purposes Have a Constitutional Right to Treatment.

Assuming, *arguendo*, that confinement under the Maryland Act is "civil" as opposed to "criminal," the Act is nevertheless unconstitutional in that persons may be confined indefinitely without treatment. The problem of civil incarceration without treatment was recently before the United States District Court for the Middle District of Alabama in the case of *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971). In a class action on behalf of patients at a large state mental hospital, Judge Franklin Johnson ruled that persons civilly committed for treatment purposes

> ". . . unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or improve his or her mental condition." 325 F. Supp. 784.

Failure to provide treatment for those persons deprived of their liberty "on the altruistic theory that the confinement is for humane therapeutic reasons" is deprivation of liberty without due process of law. 325 F.Supp. 785. He added that lack of staff or facilities does not justify inadequate treatment.

The principle of *Wyatt v. Stickney* applies equally to the Patuxent Institution. The inmates at Patuxent Institution are civilly committed in a proceeding which lacks the safeguards of an ordinary criminal trial. The theory behind their commitment is that they are intellectually deficient or emotionally unbalanced and therefore present more of a danger to society than the average criminal. The sentences for their original convictions have been suspended. If the institution to

which they are committed fails to provide treatment, then by being compelled to remain in that institution they are either being punished or preventively detained. Either punishment of preventive detention is a clear violation of their constitutional rights.

The power of the state to commit an individual for treatment for mental or physical illness arises out of the police power and the power of the state in *parens patriae*. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). See also *Buck v. Bell*, 274 U.S. 200 (1927). More recently, the Supreme Court stated in *Robinson v. California*, 370 U.S. 660 (1962), that the state may

> . . . determine that the general health and welfare require that the victims of [mental illness, leprosy and venereal disease] and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration . . . *Robinson, supra*, at 666.

The question which arises with respect to the Patuxent Institution is what to do when the quarantine, confinement, and sequestration are forthcoming but treatment is not.

C. Indefinite Commitment to the Patuxent Institution Without Treatment Is Punishment for Mere Status in Violation of the Prohibition Against Cruel and Unusual Punishment.

Any person confined without treatment under the Defective Delinquent Act is subjected to criminal penalties simply because of his status, *i.e.*, because he is "found to have such intellectual deficiency or emotional imbalance, or both, as to clearly demonstrate an actual danger to society. . . ." Such punishment is in violation of the cruel and unusual punishment clause

of the 8th Amendment. It was used as the example in *Robinson v. California* of what a state could not do. There this Court stated:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . . [In the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. 370 U.S. 660, 666 (1962).

Punishment on the basis of defective delinquent status can not be justified on the grounds that the individual has been previously convicted of a crime. The effect of such a justification would be to allow a dual sentencing procedure under which some persons could be punished in excess of the statutory maximum for a given crime by "sentencing" them under the Defective Delinquent Act to an indeterminate sentence. Other persons convicted of the same offense could be sentenced to no more than the statutory maximum. Such a procedure would deny the inmate's right to equal protection of the law under *Williams v. Illinois*, 399 U.S. 235 (1970) where this Court held that the State of Illinois could not require indigents to serve a sentence in excess of the statutory maximum simply because they could not pay a cash fine.[6] Whatever the

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[6]As in *Williams* the criterion which triggers a "sentence" in excess of the statutory maximum is an illegitimate one, related to the offender's mental defects or emotional instability. See *Robinson v. California, supra.* Moreover, the definitions used by Patuxent Institution to determine mental status include an

merits of its indeterminate sentencing,[7] discriminatory application renders it unconstitutional.

D. Indeterminate Commitment to Patuxent Institution Without Treatment Is Preventive Detention Depriving the Prisoner of His Liberty Without Due Process and in Violation of the Equal Protection Clause.

Each of the lower courts in this case recognized in their opinions that the primary purpose of the Defective Delinquent Act was to protect society from the criminal acts which the delinquents would perpetrate if they were at large. However, none of the courts below discussed the constitutional problems inhering in the preventive aspect of the act except to state that preventing anti-social conduct is a legitimate state function. The lower courts' analyses of the Act, never questioned its deleterious effect on the individual rights which limit state power.

A state can easily justify preventive detention if the only criterion is the safety of society. Preventing crimes before they occur has a peculiar persuasiveness.[8]

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invidious possibility of racial bias. The institution defines intellectual deficiency according to scores on a standardized I.Q. test. This Court has recently noted that the use of such aptitude tests in employment is "fair in form, but discriminatory in operation." *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). See also the discussion of the California experience with the problem of "middle class bias" in the criteria used by mental health professional in diagnosis. "The Dilemma of Mental Commitments in California," Subcommittee on Mental Health Services, California Legislature, Assembly Committee on Ways and Means, pp. 33-38 and Dr. Jane Mercer, "Socio-Cultural Factors in Labelling Mental Retardates," 48 Peabody Journal of Educ. 188 (April 1971).

[7]California has recently begun reconsideration of the merits of its indeterminate sentencing policy, see Appendix A.

[8]Note the Queen's argument to Alice:

"There's the King's Messenger. He's in prison now, being

(This footnote is continued on next page)

Preventive detention is not without precedent in the United States: its most infamous use was in the Japanese-American evacuation of World War II, *Hirabayashi v. U.S.*, 320 U.S. 81 (1942); *Korematsu v. U.S.*, 323 U.S. 214 (1944); its most prevalent use is to confine the mentally ill in circumstances in which treatment is purely custodial.[9] Despite these precedents, however, the constitutionality of preventive detention is not the closed question which the lower courts would have it.

The Maryland Defective Delinquent Act presents three serious constitutional problems with regard to persons for whom no treatment is provided. These problems cannot be avoided by simple references to the

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punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."

"Suppose he never commits the crime?" asked Alice.

"That would be all the better, wouldn't it?" the Queen responded. . . .

Alice felt there was no denying that. "Of course it would be all the better," she said: "But it wouldn't be all the better his being punished."

"You're wrong. . . ." said the Queen. "Were you ever punished?"

"Only for faults," said Alice.

"And you were all the better for it, I know?" the Queen said triumphantly.

"Yes, but then I had done the things I was punished for" said Alice: "That makes all the difference."

"But if you hadn't done them," the Queen said, "that would have been better still; better, and better, and better!" Her voice went higher with each "better," till it got quite to a squeak. . . .

Alice thought, "There's a mistake somewhere—"

L. Carroll, *Through the Looking Glass* 88 (Harper & Bros. ed. 1902).

[9]See Professor Alan Dershowitz, "Psychiatry in the Legal Process, A Knife That Cuts Both Ways," *Trial*, Feb./March 1968, p. 29.

civil nature of the proceedings and the state's police power. The Act:

1) Imposes a criminal penalty on the basis of a proceeding which fails to afford the subject the fundamentals of due process. (Section I, *supra.*)

2) Replaces the presumption of innocence with the presumption that given the opportunity, the subject confined would commit crimes.

3) Denies due process and equal protection in that it constitutes punishment in the absence of specific misconduct or an ascertainable standard of guilt.

The fact that the Defective Delinquent Act is in part couched in the language of psychiatric treatment makes it no less subject to constitutional safeguards. The words of Justice Brandeis are particularly appropriate in an age when we begin to allow circumvention of criminal law safeguards by invocation of psychiatric jargon.

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encorachment by men of zeal, well-meaning but without understanding.[10]

1. The Act Imposes a Criminal Penalty on the Basis of a Proceeding Which Fails to Afford the Fundamentals of Due Process.

Defective Delinquent proceedings fail to protect the accused's right to adequate notice, to avoid self-incrimination, to confront witnesses, to have the effective assistance of counsel, and to be proved guilty beyond a reasonable doubt. (See Argument, Part I.)

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[10] *Olmstead v. United States,* 277 U.S. 438, 479 (1928), (dissenting opinion).

2. The Act Replaces the Presumption of Innocence With the Presumption That Given the Opportunity, the Subject Confined Would Commit Crimes.

Preventive detention under the Defective Delinquent Act is contrary in principle and application to the Anglo-American legal tradition of a presumption of innocence. Constitutional commitment to this principle is evident in the Eighth Amendment prohibition against excessive bail. In *Stack v. Boyle*, 342 U.S. 1 (1951), this Court held that the

> . . . traditional right to freedom before conviction . . . serves to prevent the infliction of punishment prior to conviction . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. 342 U.S. 1, 4.

It is only logical that the right to remain at liberty prior to conviction includes the right to remain at liberty prior to any accusation of offense at all.

Use of bail to prevent speculative new offenses by one accused of a crime by imprisoning him prior to conviction has been held to be improper. *Davis v. U.S.*, 345 F.2d 441 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 868 (1966). Justice Jackson, serving as a Circuit Judge in the case of *Williamson v. U.S.*, 184 F.2d 280 (2d Cir. 1950), concerning bond pending an appeal of conviction of violation of the Smith Act emphasized the dangers inherent in preventive detention whether in the bail setting or elsewhere:

> If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of

> persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand trial. 184 F.2d 280, 282-83.

Nevertheless, the lower courts in the case before the Court refused to question the use of the Defective Delinquent Act to incarcerate persons until it is "safe for society to terminate confinement. . . ." The fact that the "defective delinquents" have been convicted of a criminal offense prior to commitment under the act does not militate against the injustice of presuming future criminal acts. The violation inheres in the preventive detention and indeterminate sentence, which bear no necessary relation to the maximum statutory sentence of the crime for which the "delinquent" was originally convicted. (See discussion of *Williams v. Illinois, supra,* pp. 28-29.)

3. The Act Denies Due Process and Equal Protection in That It Constitutes Punishment in the Absence of Specific Misconduct and Without an Ascertainable Standard of Guilt.

Prosecution to invoke the preventive detention provisions of the Defective Delinquent Act "means the making of a new charge leading to criminal punishment," *Specht v. Patterson,* 386 U.S. 605, 610 (1967). Prosecution and detention on the basis of this "new charge", however, is uncontitutional in that the charge includes no specific prohibited conduct or *actus reus,* thus defying adequate answer to defense by the ac-

cused and delegating authority to define the "crime" to judges, juries and psychiatrists. In *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1920), this Court outlined standards for ascertaining whether a statute

> . . . constituted a fixing by Congress of an ascertainable standard of guilt and [is] adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them, . . . *Id.* at 89.

To do so, the statute must a) forbid a "specific or definite act," b) confine "the subject-matter of the investigation," and c) fix an "immutable standard of guilt," *Id.* at 87 and 89. In applying these criteria to a section of the Lever Act regulating prices, this Court found that the statute

> . . . forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. At 89.

Like the statute in question in the *L. Cohen Grocery Co.* case, the Maryland Defective Delinquent Act fails

to charge the suspect with commission of any specific act. It opens the investigation to any conceivable event in the suspect's lifetime. Finally it abdicates legislative authority to define crime to the trier of fact and to the experts. These deficiencies render it virtually impossible for one accused under the Act to defend himself. Professor Laurence H. Tribe has described this problem in a recent article on preventive detention in the context of setting bail:

> The real vice of the accusation of dangerousness underlying this proposed statutory scheme is not that it looks to the future but that its content is so amorphous. Imagine again the impact on the accused. He is told: There is a substantial probability that you have committed a crime and that your release would endanger the community in some unspecified way. We know you can control your behavior, for we are about to try you as a criminal, but we do not trust you to refrain from crime. How could the accused possibly respond? Would he not feel, with Kafka's bewildered hero in *The Trial*, that the completion of a responsive "plea was a sheer impossibility?" For the accused to meet this openended and ultimately personalized sort of "accusation . . . the whole of [his] life would have to be recalled to mind, down to the smallest actions and accidents, clearly formulated and examined from every angle."
>
> "An Ounce of Detention: Preventive Justice in the World of John Mitchell," 56 Va. L. Rev. 371, 393 (1970).

The abdication of definition of crime is an equally serious problem. The problem in preventive detention

based on the definition of defective delinquent in the statute is the same problem which Justice Burger discussed in his concurrence in *Blocker v. U.S.*, 288 F.2d 853 (D.C. Cir. 1961):

> . . . no rule of law can possibly be sound or workable which is dependent upon the terms of another discipline whose members are in profound disagreement about what those terms mean. How can lay jurors possibly understand and apply terms whose meaning is unclear to acknowledged experts? This is not simply a matter of experts disagreeing on opinions or on diagnoses, which often occurs, but disagreement at the threshold on what their own critical terms mean. At 860.

Professor Dershowitz has also discussed the problem of asking the ultimate question in medical rather than legal terms. He states that

> . . . the medical model does not ask the proper questions, or asks them in meaningless vague terms: Is the person mentally ill? Is he dangerous to himself or others? Is he in need of care or treatment? "Psychiatry in the Legal Process: A Knife That Cuts Both Ways, Feb./March 1968 *Trial*, p. 29, 30.

Dershowitz points out that the error in the medical approach stems from the fact that

> . . . the question of which harms do, and which do not, justify incarceration is a legal—indeed a political—decision, to be made not by experts, but by the constitutionally authorized agents of the people. At 31.

He goes on to state that the questions which the legislature should answer rather than leave to the personal philosophies of diverse psychiatrists, judges and jurors include the following:

> What sorts of anticipated harm warrant involuntary confinement?
>
> How likely must it be that the harm will occur? Must there be a significant component of harm to others, or may the harm be to self alone?
>
> If harm to self is sufficient, must the person also be incapable, because he lacks insight, of weighing the risks to himself against the costs of confinement?
>
> How long a period of involuntary confinement is justified to prevent which sorts of harms? Must the likelihood of the harm increase as its severity decreases? Or as the component of harm to other decreases? At 31.

Where the legislature has made no such finding, the statute must be held invalid for the reasons stated in *L. Cohen Grocery Co.*

Conclusion.

The Maryland Defective Delinquent Act might best be compared to the New Jersey "Gangster" statute held unconstitutional in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). That statute, though drafted in less sophisticated, non-pyschological terms, made it a crime to be a gangster. A gangster was defined as

> [a]ny person not engaged in any lawful occupation, known to be a member of any gang con-

> sisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other state. . . . 306 U.S. 451, 452.

The New Jersey courts had upheld the statute, stating that:

> The manifest purpose of this legislation is to check evil in its beginning, and thus to insure the public safety. The statute is not arbitrary or unreasonable. It provides for the apprehension and punishment of a class that menaces the security of persons and property. . . . It is the undoubted function of the state to apprehend those who would violate laws ordained to protect the person and property of citizens, and who are seeking the opportunity to do so. Such persons are determined and ever active foes of society. *State v. Bell,* 188 Atl. 737, 738 (19....).

This Court overruled the statute on the ground that

> [n]o one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. 306 U.S. 451, 453.

The preventive detention provisions of the statute before the Court is remarkably similar, simply more sophisticated in that it replaces the vagaries of language with the vagaries of experts. It has been justified by the lower courts on the same grounds of public security and with parallel disregard for the individuals whose rights are abridged. The Maryland Defective Delin-

quent Act is one step more repressive than the gangster statute; unlike gangsters defective delinquents are not even provided the safeguards of a criminal trial.

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EXHIBIT A.

Los Angeles Times Tues., Nov. 16, 1971—Part I

Parole Plan to Reduce Prison Violence Voted

Tentative Release Dates Would Be Given to Inmates in Hope of Improving Behavior

By William Endicott
Times Staff Writer

SACRAMENTO—The California Adult Authority, in a move to curb violence in the state's prisons, voted Monday to set contingency release dates for hard-core inmates housed in isolation and segregation sections, commonly known as "adjustment centers."

The state's top prison official, Raymond K. Procunier, predicted the result would be "a miracle" in rehabilitation.

"If something like this doesn't happen," said Procunier, director of the state Department of Corrections, "we're not going to be operating with any order very much longer."

The action reflects a major change in Adult Authority policy and strongly implies that the concept of adjustment centers for incorrigible inmates has failed.

It also was the authority's second step toward reform in the past month.

Release Dates Endorsed

In mid-October, it endorsed giving contingency release dates to most prisoners as soon as possible after they are committed, a move officials hope will sharply reduce the need for adjustment centers.

The theory is that inmates given a tentative parole date at the outset will then be less apt to be in troublesome.

The specifics of both actions and how they will be implemented still are to be worked out.

Previously, the Adult Authority, which supervises paroles, would not grant a parole date to an adjustment center inmate until that inmate had "worked his way out of the center."

Authority member James H. Hoover of Chino, the chief proponent of the new policy, said that when adjustment centers were created in the 1950s they were hailed as a major solution to prison problems.

"Many administrators felt that if they could just get rid of that 1 or 2% of the inmates who were causing most of the problems the institution would run smoothly," Hoover said.

"This hasn't proven out, however . . . Rather than solving all the problems they have become a major source of trouble for the institution."

Adjustment Center Origin

Hoover said that almost all the fatal and critical assaults on prison staff over the last two years either happened, or had their origin in something that happened in an adjustment center.

"They are on the verge of being unmanageable," he said. "In almost all the adjustment centers, the necessary use of considerable force to get certain inmates in and out of their cells is a daily occurrence."

Prison officials believe one major reason for many of the problems is that the hard-core inmates have lost all hope of ever getting out of prison and on parole.

"Faced with this hopelessness, they have become little more than animals," Hoover said.

By granting parole dates, officials believe, many adjustment center inmates—who presently number 850 or about 5% of the total male prison population in the state—may be motivated "to conform to institutional rules . . ."

Hoover said that in addition to curbing violence, the new policy hopefully will reduce the number of inmates in adjustment centers and the average length of their stay.

Inmates normally are confined in the centers either for disciplinary reasons or because they are considered too dangerous to live with other prisoners.

2 Los Angeles Times January 19, 1972 Part II

Parole Reform

California has adopted another promising reform in its treatment of prison inmates. Under a new parole system effective Feb. 1, most of the state's convicts will receive a tentative release date within six months after they enter the prison system. Exceptions will be those with special disciplinary or mental problems.

Arguments for the reform were persuasive, chief among them being that the old system was not achieving its desired end. Twenty-eight years ago the state adopted the indeterminate sentence for convicts. Offenders were not sentenced to prison for a specific period, but "for the term prescribed by law." This gave the Adult Authority the power to tailor the time served to fit each individual case.

Progressive in theory, the indeterminate sentence came under increasing criticism as regressive in prac-

tice. In 80% of the cases, prisoners did not receive a release date until after the Adult Authority had acted favorably on parole applications. Prisoners could never be certain of a release date, and this reduced their motivation and hindered their efforts at rehabilitation.

Prisoners will now receive "contingency parole dates" but to gain their release they will have to complete training courses and maintain good behavior. The new system not only places the burden on the inmate for his release but provides him with an incentive to "learn and earn" his way out of prison. Raymond Procunier, director of the State Department of Corrections, stressed the chief defect of the present parole system by pointing to the fact that convicts see "no connection between their behavior and when they are released." Significantly, all but one of the state's prison wardens view the reform as one way to "make the institutions run cooler."

Prison officials cannot be certain their new approach toward rehabilitation will be effective, but they do know that the present system is not working.

Los Angeles Times Tues., Jan. 18, 1972—Part I

STATE WILL START NEW PAROLE SYSTEM FEB. 1

Adult Authority to Set Date of Release Early in Sentence

SACRAMENTO (UPI)—The state Adult Authority voted 6 to 2 Monday to give every California convict a tentative release date so he can "learn and earn" his way out of prison.

The "contingency parole dates" will be set after a personal interview with each convict by members of

the authority within six months of the date the inmate enters the prison system. The Adult Authority, under California law, has the responsibility of deciding when each inmate is released from prison.

The new system, which will take effect Feb. 1, is a major modification of the state's much-criticized indeterminate sentencing laws. Formerly, convicts were not told when they would get out of prison until they had served enough time to be considered "rehabilitated."

Must Complete Courses

To earn their release under the new system, they will have to complete personally selected training courses and maintain good behavior. Special cases—such as inmates with disciplinary or mental problems—will not be given dates until their behavior improves.

Adult Authority vice chairman Curtis O. Lynum, a former FBI agent, said promising the inmates a parole if they behave and complete their training "places the burden on the inmate for his release."

He said that all but one of the state's prison wardens told him that making the convicts "learn and earn" their way out would "make the institutions run cooler."

State prisons chief Raymond Procunier said he supported the plan because it "will tell a man when he's going to go home." Right now, he said, convicts see "no connection" between their behavior and when they are released.

Change Strongly Opposed

Authority member Leland Edman, a former prosecuting attorney from Fresno, strongly opposed the change. He said setting the dates in advance was "out-

landish speculation" and that inmates are given parole dates "at the earliest practical" time now.

Panel member Manley J. Bowler of Los Angeles joined Edman in voting against the proposal. Bowler said the plan was impractical because "we're dealing today with a different kind of human animal."

"We're getting the scrapings of the bottom of the barrel," he said.